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Waiver of Fourth Amendment Rights by the Accused

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WAIVER OF FOURTH AMENDMENT RIGHTS BY THE ACCUSED

INTRODUCTION

The Fourth Amendment to the United States Constitution[1] forbids all "unreasonable" searches and seizures. In general, the standard of "reasonableness" is a search warrant based on a sworn statement of probable cause issued by a magistrate.[2] A person[3] may waive his rights under the Fourth Amendment by voluntarily consenting to the search. However, if a consent is to function as a waiver, it must be unequivocal, specific, and intelligently given; uncontaminated by any duress or coercion, express or implied.[4] The courts indulge in every reasonable presumption against waiver,[5] and the burden is on the government to prove an effective consent by clear and positive evidence.[6] Under the decisions in *Mapp v. Ohio*[7] and *Ker v. California*[8] these Fourth Amendment standards are applied to the states by way of the due process clause of the Fourteenth Amendment.[9]

[1]"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized." The related provision of the Montana Constitution, Art. III, §7, is substantially the same except for a requirement that the statement of probable cause be reduced to writing.

[2]United States v. Ventresca, 380 U.S. 102, 105-107 (1965); Henry v. United States, 361 U.S. 98, 100 (1959).

[3]For discussion of the related problems of third party and inter-spousal consents *see*: 33 University of Chicago Law Review 797 (Summer, 1966); 1964 University of Illinois Law Forum 653 (Fall, 1964); 2 University of San Francisco Law Review 141 (Oct. 1967).

[4]Gorman v. United States, 380 F.2d 158 (1st Cir. 1967); Wren v. United States, 352 F.2d 617, 618 (10th Cir. 1965), *cert. den.* 384 U.S. 944 (1966); Cipres v. United States, 343 F.2d 95, 97 (9th Cir. 1965); Montana v. Tomich, 332 F.2d 987, 989 (9th Cir. 1964); United States v. Page, 302 F.2d 81, 83 (9th Cir. 1962); Judd v. United States, 190 F.2d 649, 650-51 (D.C. Cir. 1951).

[5]Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Weed v. United States, 340 F.2d 827 (10th Cir. 1965); Wion v. United States, 325 F.2d 420 (10th Cir. 1963); United States v. Page, *supra* note 4; Villano v. United States, 310 F.2d 680, 684 (10th Cir. 1962).

[6]Gorman v. United States, *supra* note 4; Montana v. Tomich, *supra* note 4 at 989; Judd v. United States, *supra* note 4 at 650-51.

[7]367 U.S. 643 (1961).

[8]374 U.S. 23 (1963).

[9]Massachusetts v. Painten, 368 F.2d 142 (1st Cir. 1966), *appeal dismissed*, 389 U.S. 560 (1968); Montana v. Tomich, *sura* note 4; Hubbard v. Tinsley, 336 F.2d 854 (10th Cir. 1964); Simmons v. Bomar, 349 F.2d 365 (6th Cir. 1964).

PROCEDURE AND SCOPE OF REVIEW

The question of whether the defendant has waived his Fourth Amendment rights almost invariably arises in the form of a motion to suppress evidence found in the course of the search.[10] When such a motion is properly raised, the trial court[11] must conduct an evidentiary hearing[12] to resolve the factual[13] issues.

In reviewing the evidence, the court is not limited to any particular criteria; nor is any one factor conclusive[14] as to either the presence of a waiver or its absence. The examination is made of the totality of circumstances[15] which surround the consent and subsequent search. Throughout this examination, the presumption is against waiver, and the burden is on the state to prove voluntariness by "clear and positive evidence."[16]

Because the issue is a factual one, the conclusions of the trial court are given great weight on review, especially where there has been conflicting testimony[17] or if the court has made specific findings of fact.[18] The appellate court will, however, review the entire record to determine whether the state has sustained its burden under the totality of circumstances test[19] and to see if there is "clear error"[20] in any specific finding. It is not bound by the bare conclusion that the accused consented to the search.[21]

[10]The exclusionary rule was developed for the Federal courts in Weeks v. United States, 232 U.S. 383 (1914), and was applied to the states as a Constitutional requirement by way of the Fourteenth Amendment in Mapp v. Ohio, 367 U.S. 643 (1961). *Cf.* RCM 95-1806. Note also that the question of waiver only arises when the evidence sought to be admitted has not been otherwise lawfully seized, for example by a search warrant or reasonably incident to a valid arrest.

[11]Tatum v. United States, 321 F.2d 219 (9th Cir. 1963); Hoing v. United States, 208 F.2d 916 (8th Cir. 1953); United States v. Bianco, 96 F.2d 97 (2nd Cir. 1938).

[12]Townsend v. Sain, 372 U.S. 293 (1963); Hubbard v. Tinsley, 336 F.2d 854 (10th Cir. 1964). *Cf.* RMC 95-1806(e); F. R. Crim. Pro. 41(e).

[13]United States v. Dornblut, 261 F.2d 949 (2nd Cir. 1958), *cert. den.* 360 U.S. 912 (1959); United States v. Bianco, *supra* note 11; United States v. Martin, 176 F. Supp. 262 (S.D. N.Y. 1959).

[14]United States v. Jordan, 399 F.2d 610 (2nd Cir.), *cert. den.*, 393 U.S. 1005 (1968) (fact that the defendant was fully advised of his Fourth, Fifth, and Sixth Amendment rights outweighed facts that he was in custody, had been told that it was best to cooperate and mention of a search warrant); State v. Moran, 142 Mont. 423, 384 P.2d 777 (1963) (officers' persistence in obtaining consent was overcome by fact that the defendant himself was a police officer).

[15]Cipres v. United States, *supra* note 4; Hoing v. United States, *supra* note 11.

[16]United States v. Como, 340 F.2d 891 (2nd Cir. 1965). By this standard, RCM 95-1806(f) appears to be unconstitutional at least insofar as it requires the defendant to prove that he did *not* waive his Fourth Amendment rights.

[17]Rogers v. United States, 369 F.2d 944 (10th Cir. 1966), *cert. den., sub nom.* Ferguson v. United States, 388 U.S. 922 (1967); United States v. Ziemer, 291 F.2d 100 (7th Cir.), *cert den.*, 368 U.S. 877 (1961); Hoing v. United States, *supra* note 11.

[18]Hubbard v. Tinsley, *supra* note 9.

[19]Cipres v. United States, *supra* note 4; United States v. Page, *supra* note 4.

[20]Villano v. United States, *supra* note 5.

[21]Montana v. Tomich, *supra* note 4.

COERCION

To be free from coercion, any words or acts of consent must be the voluntary product of a free will, however unhappily expressed,[22] and not the product of hope or fear[23] or peaceful submission to authority.[24]

If there has been "direct" coercion, in the sense of actual intimidation, either by the police[25] or by some other governmental agency,[26] it is almost invariably held that any assent to search was not voluntarily given. In close situations, however, the result may turn as much on the character and action of the accused as on those of the police.

The courts have long recognized[27] that a police dominated atmosphere is inherently coercive. Accordingly, where the police display their badges, announce their purpose is to search, and ask the accused if he has any objections,[28] or in other ways indicate that a search will be carried on in any event,[29] permission to search is generally interpreted as a peaceful submission to authority rather than a true waiver. This is especially true where other coercive circumstances are present.[30]

A similar result occurs where the police persist in requesting permission to search until the defendant consents. However, the presumption of coercion here may be overcome by a strong showing that the persistence of the police did not in fact coerce the defendant, especially by showing that he was at all times aware of his right to require the police to obtain a search warrant.[31]

A more complex question arises when the police tell the accused that he might as well consent since they can obtain a search warrant in any event. It has been held that such a statement, without more, is not sufficiently coercive to invalidate a consent.[32] However, the courts are quick

[22]Gorman v. United States, *supra* note 4.

[23]United States v. Baldocci, 42 F.2d 567 (S.D. Cal. 1930).

[24]Amos v. United States, 255 U.S. 313 (1921); United States v. Slusser, 270 F. 818 (S.D. Ohio 1921).

[25]Villano v. United States, *supra* note 5 (defendant taken from his house late at night by officers who pushed him around and used intimidating language); Judd v. United States, *supra* note 4 (night-time arrest; "consent" came after hours of questioning).

[26]Boyd v. United States, 116 U.S. 616 (1886) (court order); Nelson v. United States, 208 F.2d 505 (D.C. Cir.),*cert den.*, 346 U.S. 827 (1953) (Senate subcommittee browbeat witness and threatened him with contempt).

[27]Amos v. United States, *supra* note 24. *Cf.* Miranda v. Arizona, 384 U.S. 436 (1966).

[28]Amos v. United States, *supra* note 24; Massachusetts v. Painten, *supra* note 9; Villano v. United States, *supra* note 5; Farris v. United States, 24 F.2d 639 (9th Cir.), *cert den.*, 277 U.S. 607 (1928); United States v. Slusser, *supra* note 24.

[29]Farris v. United States, *supra* note 28.

[30]United States v. Brennan, 251 F. Supp. 99 (N.D. Ohio 1966) (six heavily armed agents; early morning "raid"); United States v. Nikrasch 367 F.2d 740 (7th Cir. 1966) (defendant in custody). *But see* McDonald v. United States, 307 F.2d 272 (10th Cir. 1962).

[31]United States v. Jordan, *supra* note 14; *Cf.* State v. Moran, *supra* note 14.

[32]Gattendam v. United States, 5 F.2d 673 (6th Cir. 1925).

to hold the opposite if other coercive circumstances are present,[33] and it is universally held that the defendant does not waive his rights by permitting a search when confronted by a purported or void[34] search warrant.

IN-CUSTODY CONSENT

While the Federal courts have held that the mere fact that a person is in custody does not prevent him from waiving his Fourth Amendment rights,[35] the burden on the state of proving freedom from coercion is particularly heavy.[36] This is especially true where the accused has been held incommunicado for long periods[37] or where other coercive circumstances are present.[38]

In addition, if the defendant has not been given his *Miranda*[39] warning, any evidence obtained as a result of an in-custody consent to search may be subject to suppression on Fifth Amendment grounds. Historically, the Supreme Court has repeatedly noted a close and intimate relationship in the scope, purpose, and effect of the Fourth and Fifth Amendments.[40] In view of this, there would seem to be no compelling or even rational reason why the exceedingly broad language of *Miranda*[41] would not apply to a statement which gave the police permission to search as well as to an admission or confession in the strict sense. The evidence seized would then be subject to suppression as a "fruit of the poisonous tree" under the rule of *Silverthorne Lumber Co. v. United States.*[42]

[33]United States v. Baldocci, *supra* note 23 (defendant under arrest).

[34]United States v. Scott, 102 F. Supp. 747 (S.D. Tex. 1950).

[35]United States v. Page, *supra* note 4; Raimondi v. United States, 207 F.2d 695 (9th Cir. 1953) (by implication); Ruhl v. United States, 148 F.2d 173 (10th Cir. 1945).

[36]United States v. Jordan, *supra* note 14; Hubbard v. Tinsley, *supra* note 9; Wion v. United States, *supra* note 5; Watson v. United States, 249 F.2d 106 (D.C. Cir. 1057); Judd v. United States, *supra* note 4.

[37]United States v. Nikrasch, *supra* note 30; United States v. Arrington, 215 F.2d 630 (7th Cir. 1954); Judd v. United States, *supra* note 4. *Contra,* McDonald v. United States, *supra* note 30.

[38]Villano v. United States, *supra* note 5.

[39]Miranda v. Arizona, 384 U.S. 436 (1966).

[40]Boyd v. United States, *supra* note 26; Gould v. United States, 255 U.S. 298 (1921); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1930); Feldman v. United States, 322 U.S.487 (1944).

[41]"The warnings required and the waiver necessary in accordance with our opinion of today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by the defendant. No distinction can be drawn between statements which are direct confessions and statements which amount to 'admissions' of part or all of the offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination." 384 U.S. at 476.

[42]251 U.S. 385 (1920). *Accord,* Wong Sun v. United States, 371 U.S. 471 (1963).

[43]United States v. Jordan, 399 F.2d 610 (2nd Cir. 1968); Forman v. United States, 380 F.2d 158 (1st Cir. 1967); United States v. Hall, 348 F.2d 837 (2nd Cir.), *cert. den.,* 382 U.S. 987 (1965).

[44]*Supra,* note 36.

[45]*Supra,* note 39 at 467.

Conversely, some courts [43] have held that where the defendant has been given his *Miranda* warning, the "heavy burden" rule[44] no longer applies. The reason usually given is that the *Miranda* warning acts to minimize the "inherently compelling pressures"[52] of custodial interrogation, which was the reason for the earlier rule.

CHARACTER AND EXPERIENCE OF THE ACCUSED

Because the question of waiver is primarily subjective in nature, one of the most important factors in determining the presence or absence of coercion is the personality, training, and experience of the accused. For example, if a person is a housewife,[46] a mental defective,[47] a member of a suspect and persecuted class,[48] or is inarticulate,[49] illiterate,[50] or does not speak English,[51] the burden on the state to show that the consent was the voluntary product of a free will is considerably heavier.

On the other hand, if the accused's background tends to indicate that he has knowledge of police procedures and of his rights to remain silent and to require a search warrant, there is strong evidence that his consent was uncoerced.[52] It should be remembered, however, that the accused's training and experience are but one factor in the "totality of circumstances"; and if the coercive circumstances are strong enough, the consent of even the most hardened criminal must fall.[53]

CHARACTER OF THE EVIDENCE SOUGHT TO BE SUPPRESSED

The courts also tend to examine the nature of the evidence found and when and how the alleged consent was given to determine if it is inherently reasonable that a person could voluntarily consent under such circumstances.

If the evidence found is contraband and the accused has denied his guilt, a presumption arises that any consent in fact was coerced because ". . . no sane man who denies his guilt would actually be willing that

[46]Amos v. United States, *supra* note 24.

[47]Culombe v. Connecticut, 367 U.S. 568 (1961) (by implication, coerced confession case).

[48]Takahashi v. United States, 143 F.2d 118 (9th Cir. 1944) (Japanese-American during World War II).

[49]United States v. Wallace, 169 F. Supp. 859 (D. D.C. 1958).

[50]Kovach v. United States, 53 F.2d 639 (6th Cir. 1931).

[51]United States v. Wai Lau, 215 F. Supp. 684 (S.D. N.Y. 1963); United States v. Ong Goon Sing, 149 F. Supp. 267 (S.D. N.Y. 1957).

[52]Grillo v. United States, 336 F.2d 211 (1st Cir. 1964), *cert den.*, 379 U.S. 971 (1965) (lawyer); Tatum v. United States, *supra* note 11 (private detective); State v. Moran, *supra* note 14 (police officer).

[53]Nelson v. United States, *supra* note 26 (professional gambler browbeaten by Senate subcommittee).

policemen search his room for contraband which is certain to be found."[54] Such a presumption may be rebutted by evidence tending to show that the defendant believed that the contraband was not present[55] or was too well hidden to be found.[56]

The relation of the evidence found to the circumstances surrounding the alleged consent may also be a factor favoring waiver. Thus, if the evidence is merely cumulative or impeaching in nature,[57] or if the facts tend to show that the defendant did not appreciate its evidentiary values against him,[58] there is some inference that the consent was uncoerced. A similar inference arises if the consent has come after the accused has voluntarily confessed or made damaging admissions against interest.[59]

COOPERATION IN THE SEARCH

Another factor tending to indicate a consent free from coercion is where the accused actively assists in the search.[60] Such affirmative assistance may be in the form of handing over a set of keys,[61] by pointing out where the evidence is located [62] or instructing another to show it to the officers,[63] by indicating the nature of the evidence,[64] or by physically assisting in the search.[65]

Again, the opposite is equally true; and if the accused, even though he has given some sort of verbal assent, is evasive or uncooperative, the courts may find that the consent was not truly voluntary.[66]

[54]Higgens v. United States, 209 F.2d (D.C. Cir. 1951). *Accord,* Cipres v. United States, *supra* note 4; United States v. Shropshire, 271 F. Supp. 521 (E.D. La. 1967); United States v. Wallace, *sura* note 49 (dictum, applied to "mere evidence"). *But See* Raimondi v. United States, *supra* note 35.

[55]Higgens v. United States, *supra* note 54 at 819 (dictum).

[56]Grice v. United States, 146 F.2d 849 (4th Cir. 1945).

[57]Gorman v. United States, *supra* note 4

[58]United States v. Torres, 354 F.2d 633 (7th Cir. 1966) (money from sale of narcotics); United States v. Dornblut, *supra* note 13 (marked money).

[59]United States v. Hall, 348 F.2d 837 (2nd Cir. 1965).

[60]United States v. Sith, 308 F.2d 657 (2nd Cir. 1962), *cert .den.,* 372 U.S. 906 (1963); United States v. Sferras, 210 F.2d 69 (7th Cir.), *cert den., sub. mon.* Skally v. United States, 347 U.S. 935 (1954).

[61]Robinson v. United States, 325 F.2d 880 (5th Cir. 1964).

[62]Rogers v. United States, *supra* note 17; Raimondi v. United States, *supra* note 35.

[63]Windsor v. United States, 286 F. 51 (6th Cir. 1923).

[64]United States v. Torres, *supra* note 58.

[65]United States *ex. rel.* Anderson v. Rundle, 274 F. Supp. 364 (E.D. Pa. 1967), *aff'd.* 393 F.2d 635 (3rd Cir. 1968).

[66]Canida v. United States, 250 F.2d 822 (5th Cir. 1958) (refusal to sign written waiver); Pekar v. United States, 315 F.2d 319 (5th Cir. 1963) (long delay before admitting officers; refusal to sign written waiver); Montana v. Tomich, *supra* note 4 key hidden in shoe); Cipres v. United States, *supra* note 4 (defendant told officers that suitcase was locked and key was in another city).

SPECIFIC AND UNEQUIVOCAL CONSENT

The requirement that any consent, if it is to function as a waiver, must be both specific and unequivocal derives from the Constitutional prohibition against general exploratory searches.[67]

Although there has been little litigation on the issue, the measure of specificity seems to be whether the place searched is reasonably included in the permission given.[68] As always, the scope of the permission is measured by the words of consent and the "totality of circumstances" under which they were spoken. A necessary corollary to this rule is that a person may condition or limit his consent as he wishes, and the police are bound to stay within the limits of the consent.

To meet the standard of unequivocalness, the state must show that the accused truly manifested an intent to allow the search. For example, merely indicating where an object is located is not consent to search it,[69] nor can such consent be presumed from the defendant's failure to protest.[70]

Even if the accused has given some form of verbal assent, equivocalness can still be shown from his contemporaneous actions. Refusal to sign a written waiver is strong[71] but not conclusive evidence that the defendant did not clearly intend to allow the search. Equivocalness may also be found if the accused is hesitant,[72] nervous,[73] evasive,[74] or in other ways uncooperative at the time verbal assent was given.

INTELLIGENT CONSENT

Broadly stated, for there to be a waiver of a fundamental Constitutional right, there must be " . . . an intentional abandonment of a known right of privilege."[75]

At the very least, this standard requires that the state prove that the accused could comprehend what he was doing when he gave the

[67]Go-Bart Importing Company v. United States, *supra* note 40. *Cf.* Boyd v. United States, *supra* note 26; Gould v. United States, 255 U.S., *supra* note 40.

[68]Drummond v. United States, 350 F.2d 983 (8th Cir. 1965), *cert. den.*, 384 U.S. 944 (1966) (written waiver to search "my residence" includes garage on property); Karwicki v. United States, 55 F.2d 225 (4th Cir. 1932) (oral consent to search near beer saloon not consent to search adjoining house).

[69]Whitley v. United States, 237 F.2d 787 (5th Cir. 1956).

[70]Canida v. United States, *supra* note 66.

[71]Pekar v. United States, *supra* note 66; Canida v. United States, *supra* note 26.

[72]Pekar v. United States, *supra* note 66.

[73]*Id.*

[74]Cipres v. United States, *supra* note 4; Montana v. Tomich, *supra* note 4.

[75]Johnson v. Zerbst, *supra* note 5.

alleged assent. If the defendant is a mental defective,[76] illiterate,[77] unable to speak English,[78] or intoxicated,[79] the state's burden is very great indeed. Likewise, a consent is not intelligently given if obtained by fraud, whether in the "inducement"[80] or in the "execution."[81]

However, for there to be such a fraud as to invalidate a consent, it must be shown that the police deliberately deceived the accused[82] and that the misrepresentation in turn caused[83] the accused to give his assent to the search. If these standards are met, it does not make any difference whether the misrepresentation was one of fact,[84] law,[85] or the officer's intent toward the accused.[86]

The outer limits of what constitutes a fraud by government agents has been explored in a series of cases dealing with inspections of regulatory or taxing agencies.[87] These cases have held that while an agent may not make active misrepresentations,[88] he is under no affirmative duty to disclose when his investigations have turned from civil to criminal in nature. The principal rationale for this rule, as advanced in *United States v. Sclafani,*[89] is that the presence of the agent by itself is sufficient warning, since he could hardly be expected to refrain from reporting a criminal violation if one turned up. A more satisfactory

[76]*Supra,* note 47.

[77]*Supra,* note 50.

[78]*Supra,* note 51.

[79]United States v. Shropshire, *supra* note 64. *Contra,* United States v. Hickey, 247 F. Supp. 621 (E.D. Pa. 1965) (both decisions could have rested on alternate grounds).

[80]United States v. Reckis, 119 F. Supp. 687 (D. Mass. 1954); United States v. Ong Goon Sing, *supra* note 51.

[81]United States v. Brennan, *supra* note 30.

[82]United States v. Sclafani, 265 F.2d 408 (2nd Cir.), *cert. den.,* 360 U.S. 918 (1959) (dictum); Chapman v. United States, 346 F.2d 383 (9th Cir. 1965), *cert. den.,* 382 U.S. 909 (1965); United States v. Como, *supra* note 16; United States v. Horton, 328 F.2d 132 (3rd Cir.), *cert den.,* 377 U.S. 970 (1964); United States v. Hecht, 259 F. Supp. 581 (W.D. Pa. 1966).

[83]United States v. Hecht, *supra* note 82; United States v. General Pharmacal Co., 205 F. Supp. 692 (D. N.J. 1962); United States v. Martin, *supra* note 13.

[84]United States v. Reckis, *supra* note 80 (business call); United States v. Ong Goon Sing, *supra* note 51 (officers were there to assist defendant in proving that his sons were American citizens).

[85]*Supra,* note 49. But there is no affirmative duty to warn the accused of all the possible legal ramifications of his act. Burnham v. United States, 297 F.2d 523 (1st Cir. 1961).

[86]*Supra,* note 16.

[87]United States v. Sclafani, *supra* note 82; Turner v. United States, 222 F.2d 926 (4th Cir.), *cert. den.,* 350 U.S. 831 (1955); Application of Greene, 192 F. Supp. 49 (W.D. N.Y.), *aff'd.* 296 F.2d 841 (2nd Cir. 1961), *vacated,* 369 U.S. 403 (1962); Badger Meter Manufacturing Co. v. Brennah, 216 F. Supp. 426 (E.D. Wis. 1962), *cert den.,* 373 U.S. 902 (1963) (all Internal Revenue Service); Burnham v. United States, 297 F.2d 523 (1st Cir. 1961) (Interstate Commerce Commission); Bowles v. Joseph Denunzio Fruit Co., 55 F. Cupp. 9 (W.D. Ky. 1944) (Office of Price Administration); United States v. General Pharmacal Co., *supra* note 83 (Food and Drug Administration).

[88]Chieftain Pontiac Corp. v. Julian, 209 F.2d 657 (1st Cir. 1954) (dictum).

[89]*Supra,* note 82.

explanation is that on the facts of most of these cases there was not a sufficiently active misrepresentation to constitute a fraud.[90]

It should be noted that in this area, at least, the courts do not speak of whether the defendant has "waived" his rights, but whether the conduct of the police violated a certain standard of reasonableness. A right cannot be "intentionally abandoned" by a person when he is not aware that the right is in jeopardy, even if the mistaken belief is the result of accident or a benign misrepresentation by the police.

FOURTH AMENDMENT WARNING

Ever since *Johnson v. Zerbst,*[91] the Federal courts have continually cited it for the proposition that in order for a consent to function as a waiver of Fourth Amendment rights, "it must be 'intelligently given;' that is, an intentional abandonment of a known right or privilege."[92]

However, with few exceptions,[93] the courts have failed to squarely face the logical implications of this statement in face of the defendant's lack of actual knowledge of his rights, until the decision in *Miranda v. Arizona.*[94] Since that time the issue has become hotly litigated, with most of the state court decisions rejecting the necessity of a warning.[95] The Federal decisions are more evenly divided.[96]

The reasons behind the holdings are diverse. Most of the decisions requiring a warning are based on either a logical extension of *Miranda*

[90]United States v. Burnham, 297 F.2d 523 (1st Cir. 1961). Compare cases where the intent of the police taints an otherwise permissible act. Massachusetts v. Painten, 368 F.2d 142 (1st Cir. 1966) (intent to search and arrest without probable cause); Taglavore v. United States, 271 F.2d 262 (9th Cir. 1961) (sham arrest).

[91]*Supra,* note 5.

[92]*Id.* at 464. *Accord,* Judd v. United States, *supra* note 4; United States v. Page, *supra* note 4; United States v. Smith, *supra* note 60; Villano v. United States, *supra* note 5; Montana v. Tomich, *supra* note 4; Cipres v. United States, *supra* note 4; Wren v. United States, *supra* note 4; United States *ex. rel.* Gockley v. Myers, 378 F.2d 398 (3rd Cir. 1967).

[93]United States v. Nikrasch, *supra* note 30; United States v. Roberts, 179 F. Supp. 478 (D. D.C. 1959), United States v. Blalock, 255 F. Supp. 268 (E.D. Pa. 1966).

[94]*Supra,* note 39.

[95]State v. Forney, 181 Neb. 757, 159 N.W.2d 915 (1967), *aff'd. on hearing by full court,* 182 Neb. 802, 157 N.W.2d 403 (1968), *cert. den.,* 393 U.S. 1044 (1969); State v. McCarty, 199 Kan. 16 427 P.2d 616 (1967); Lamot v. State, 2 Md.App. 378, 234 A.2d 615 (1967); State v. Leavitt, 237 A.2d 309 (R.I.), *cert. den.,* 393 U.S. 851 (1968); State v. Frisby, 245 A.2d 786 (Del. 1968); People v. Trent, 85 Ill.App.2d 157, 228 N.E.2d 535 (1967); State v. Oldham, 92 Ida. 124, 438 P.2d 275 (1968); State v. Williams ..... Mont. ....., 455 P.2d 634 (1969). *Contra,* State v. Williams, 248 Ore. 85, 432 P.2d 679 (1967).

[96]In addition to the cases cited in note 93 *supra,* Gorman v. United States, *supra* note 4 (no warning required); United States *ex. rel.* Anderson v. Rundle, *supra,* note 64 (same); United States v. Moderacki, 280 F. Supp. 633 (D. Del. 1968) (warning required).

to Fourth Amendment rights[97] or a literal application of the holding in *Johnson v. Zerbst*[98] and the dicta in the consent search cases which follow it.[99] Those decisions rejecting a warning requirement are founded on either the theoretical differences in the purposes served by the Fourth and Fifth Amendments,[100] on the theory that the *Miranda* warning is adequate protection for the individual,[101] or on a fear of "shackling" the police.[102]

Although a Fourth Amendment warning seems desirable, as an abstract proposition, in that it would allow a person to make up his mind whether or not to permit a search, in perfect knowledge of his rights, there are compelling reasons for not requiring such a warning, at least not until there is more concrete evidence that such a warning is essential to safeguard the rights of the accused.

Most truly questionable consents occur in a "police dominated atmosphere" such that the *Miranda* warning is required; and, as was stated previously, if the warning is not given, the "fruits" of such a consent are no less suppressible than an admission or confession. Moreover, a strong case is made in *United States v. Gorman*[103] that *Miranda*, by warning the defendant of his keystone right to silence[104] and by dispelling the "inherent pressures" of the interrogation process, furnishes an adequate minimum of protection to the individual.

Additionally, when police interrogate a suspect, they are invariably intending to obtain some sort of incriminating information from him, if only a "story" to be used for impeachment purposes. Such an interrogation is not necessarily conducted with a view toward obtaining assent to search. All of this raises a valid question whether the marginal protection to the individual justifies the imposition on the police, by Constitutional imperative, of an additional, repetitive, and "slightly ridiculous"[105] warning requirement.

This is not to minimize the serious social problems at which a Fourth Amendment warning is aimed. Because no two sets of facts are exactly alike, the subjective standards now in force tend to work inconsistently and leave the fate of the accused up to the predilections of individual

[97] *E.g.*, State v. Williams 248 Ore. 85, 432 P.2d 679 (1967); United States v. Moderacki, *supra*, note 96.

[98] *Supra*, note 5.

[99] *Supra*, note 92.

[100] *E.g.*, State v. Forney, *supra*, note 95; State v. McCarty, *supra*, note 95.

[101] Gorman v. United States, *supra*, note 4.

[102] Porter v. Ashmore, 298 F. Supp. 951 (D. S.C. 1969).

[103] *Supra*, note 4.

[104] *Supra*, note 39 at 467-68.

[105] United States v. Moderacki, *supra*, note 96 at 636 (concluding that the burden was justified).

judges.[106] A related but no less serious problem is the tendency of some judges to believe the police over the accused,[107] whether from long experience with recidivists or from a desire not to see the obviously guilty prisoner escape punishment over a "technicality."[108]

More fundamentally, the whole notion of consent searches is subject to significant doubts. Most such searches occur when the police either do not have probable cause to obtain a search warrant, justify an arrest or when they are unwilling to go to the trouble to obtain a warrant. A relaxed judicial attitude toward such searches could turn the guarantees of the Fourth Amendment into a "form of words."[109]

CONCLUSION: SHOULD A FOURTH AMENDMENT WARNING BE REQUIRED?

The above suggests the need for caution before any judicially conceived warning is imposed as a Constitutional requirement. Perhaps a less drastic measure which would achieve the same results would be to strengthen the existing requirement that the state must bear the burden of proving a voluntary consent by, for example, requiring the trial court to find the specific facts on which it bases its conclusion that the defendant waived his rights. In any event, more time is needed to determine the effect of the *Miranda* warning on police interrogation practices.

In the past, some of the decisions of the Supreme Court concerning criminal law have been rightfully accused of having been decided in an intellectual vacuum, divorced from the realities of American criminal justice.[110] The trend away from this culminated in *Miranda,* which can only be viewed as having been brought on by the realities of police interrogation.[111] It would be ironic and unfortunate if *Miranda* itself were extended not on the basis of the realistic needs of protecting the rights of the accused, but on a similar process of intellectualization.

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[106] "Assessments of the knowledge the defendant possessed based on information as to his age, education, intelligence, or prior contact with authorities can never be more than a speculation; a warning is a clearcut fact." Miranda v. Arizona, 384 U.S. at 468.

[107] *E.g.,* McDonald v. United States, 307 F.2d 272 (10th Cir. 1962).

[108] Porter v. Ashmore, *supra,* note 102.

[109] Silvertone Lumber Co. v. United States, *supra,* note 42 at 392 (Holmes, J.).

[110] *E.g.,* Betts v. Brady, 316 U.S. 455 (1942), which set up the "special circumstances" test for the state to be required to provide counsel for indigents in felony cases.

[111] In Miranda some thirteen pages at the beginning of the opinion are devoted to a review of these practices. 384 U.S. at 445-58.